UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMELOT TERRACE, INC. AND GALESBURG TERRACE, INC.	)	
Petitioners/Cross-Respondents	)	Nos. 12-1071, 12-1218
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos. 33-CA-15584, 33-CA-15669, 33-CA-15781,
Respondent/Cross-Petitioner	)	33-CA-15587, 33-CA-15670, 33-CA-15780
and	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, HEALTHCARE ILLINOIS INDIANA	)	
Intervenor	)	

MOTION OF THE NATIONAL LABOR RELATIONS BOARD
TO LODGE WITH THE COURT THE COMPANY'S BRIEF
IN SUPPORT OF EXCEPTIONS

To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board, by its Deputy Associate General Counsel, respectfully requests permission to lodge with the Court the Brief in Support of Exceptions to the Administrative Law Judge's Decision, which Camelot Terrace, Inc., and Galesburg Terrace, Inc. ("the Company") submitted to the Board in appeal of the judge's decision. In support of its motion, the Board shows:

1. As discussed in the Board's brief to the Court, a central issue in this case is whether the Company preserved certain appellate arguments by raising them first to the Board. The Board contends that the Company waived any issue with respect to the reimbursement of negotiating expenses portion of the Board's remedial Order by failing to raise those issues before the Board and, therefore, cannot raise them for the first time to the Court.

2. The record in a Board case does not include briefs in support of exceptions. *See* 29 C.F.R. § 102.45(b).[1] In light of that fact, the Board's normal practice in cases where a party's brief may prove helpful to the Court is to recommend that the Court permit the brief to be lodged separately from the formal record.

For the foregoing reasons, the Board requests that the Court grant its motion to lodge with the Court the Company's Brief in Support of Exceptions to the Administrative Law Judge's Decision (attached).

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[1] That section provides that the record before the Board consists of:

> The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in section 102.46, shall constitute the record in the case.

29 C.F.R. § 102.45(b).

/s/Linda Dreeben
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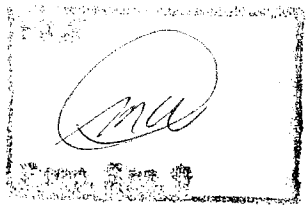
Dated at Washington, D.C.
This 3rd day of April 2015

ATTACHMENT



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAMELOT TERRACE

and Cases 33-CA-15584
33-CA-15669

SERVICE EMPLOYEES INTERNATIONAL
UNION HEALTHCARE LOCAL 4

GALESBURG TERRACE

and Cases 33-CA-15587
33-CA-15670

SERVICE EMPLOYEES INTERNATIONAL
UNION HEALTHCARE LOCAL 4

GALESBURG TERRACE

and Case 33-CA-15780

SERVICE EMPLOYEES INTERNATIONAL
UNION HEALTHCARE ILLINOIS AND INDIANA

CAMELOT TERRACE

and Case 33-CA-15581

SERVICE EMPLOYEES INTERNATIONAL
UNION HEALTHCARE ILLINOIS AND INDIANA

RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

I. PRELIMINARY STATEMENT

Camelot Terrace ("Camelot") and Galesburg Terrace ("Galesburg") (collectively "Respondents") submit this Brief in Support of Exceptions to the Administrative Law Judge's Decision ("Decision") issued on December 31, 2009. The Exceptions provide that the Administrative Law Judge ("ALJ") made erroneous legal conclusions with regard to the remedy provisions of his recommended Order that required Respondents to:

> (c) Reimburse the National Labor Relations Board (Board) and the Union for all costs and expenses incurred in the investigation, preparation, and conduct of Cases 33-CA-15780 and 33-CA-15781 before the Board and the courts; and
>
> (d) Reimburse the Union for all costs and expenses incurred in collective-bargaining negotiations from January 2008 to the last bargaining session in connection with Cases 33-CA-15780 and 33-CA-15781, and Cases 33-CA-15584, 33-CA-15587, 33-CA-15669, and 33-CA-15670.

(Decision ("D") at 104).

Respondents respectfully request that these provisions of the ALJ's recommended Order not be included in the Board's final Order and that the Notice to Employees be modified accordingly.[1]

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[1] Respondents are not excepting to the ALJ's credibility and factual findings except to the extent that the ALJ concluded his findings support the award of litigation and bargaining costs to the Board and the Union.

II. STATEMENT OF THE CASE

A. Procedural Background

Beginning on May 16, 2008, the Service Employees International Union Healthcare Local 4 ("Union") filed a series of charges with the National Labor Relations Board ("Board") against Respondents alleging that from January to September 2008, Respondents failed and refused to bargain in good faith in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act ("Act"). The Union's charges resulted in the Board issuing an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 33-CA-15584, 33-CA-15587, 33-CA-15669, and 33-CA-15670 on October 29, 2008.

The cases were tried in Peoria, Illinois on November 12 and 13, 2008. On December 4, 2008, Counsel for the General Counsel ("CGC") filed a Recommendation to Approve Settlement Agreements between the Union and the Respondents. The settlement agreements were approved, and the consolidated proceeding was continued indefinitely pending the filing of a motion by CGC indicating that compliance with the terms of the settlement agreements had been achieved. If that occurred, the charges would be withdrawn, the amended consolidated complaint dismissed, and the record in the matter closed.

By pleading dated June 18, 2009, CGC moved to reopen the record in Cases 33-CA-15584, 33-CA-15587, 33-CA-15669, and 33-CA-15670, set aside the settlement agreement in these cases, and consolidate these cases with Cases 33-CA-15780 and 33-CA-15781. CGC alleged that subsequent to signing

the settlement agreements, Respondents engaged in conduct that violated the agreements. By Order entered June 30, 2009, the approval of the settlement agreements was withdrawn; the record was reopened; and, the prior cases were consolidated with Cases 33-CA-15780 and 33-CA-15781.[2]

The consolidated cases were tried before ALJ John H. West on August 25 and 26, 2009. With regard to the specific charges in the Consolidated Complaints ("Complaints"), the ALJ concluded that Respondents collectively had engaged in the unfair labor practices alleged in the Complaints (D. at 101). Based on his findings, the ALJ set aside the prior settlement agreements. As part of the remedy in his recommended Order, the ALJ required that Respondents compensate the Board and the Union for litigation expenses and costs and the Union for costs associated with collective bargaining negotiations from January 2008 to the last bargaining session in connection with these cases (D. at 104).

III. LAW AND ARGUMENT

A. The Board Lacks Authority to Award Litigation Expenses and Bargaining Costs

1. The D.C. Circuit Has Rejected the Board's Authority to Award Litigation Costs Under Section 10(c)

Section 10(c) of the Act provides:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged

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[2] The charges were filed by Service Employees International Union Healthcare Illinois and Indiana ("Union").

> in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act].

29 U.S.C. § 160(c).

The Board claims it has the authority under Section 10(c) to order a respondent to pay the litigation costs, including attorneys' fees, incurred by a charging party and the General Counsel. *See Lake Holiday Associates, Inc.*, 325 NLRB 469 (1998); *August A. Busch & Co. of Mass., Inc.*, 334 NLRB 1190, 1193 (2001). However, in *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997), the U.S. Court of Appeals for the District of Columbia Circuit rejected this view and held that the Board lacked authority under Section 10(c) to order an employer to pay the litigation expenses incurred by a charging party or by the General Counsel. The court found "no support for the Board's position in the terms of the NLRA, in its legislative history, or in Supreme Court precedent interpreting the extent of the Board's remedial discretion." *Id.* at 803. The court concluded its analysis by observing:

> Whether the [respondent's] misconduct lay in its presentation of a frivolous defense to an unfair labor practice charge or in its misconduct during bargaining, or both, a fair reading of the Supreme Court's decisions suggests to us that the order that the employer pay its adversaries' attorney's fees is punitive and is not directly related to effectuating the policies of the Act.

Id. at 806.

Respondents respectively request that the Board reevaluate its position on this issue, taking into consideration the D.C. Circuit's reasoning in *Unbelievable, Inc. v. NLRB.*

2. The Board Lacks the Inherent Authority to Award Costs

The Board also has held that it has the inherent authority to control its own proceedings and that such authority includes the authority to award costs in appropriate cases. *See, e.g., August A. Busch & Co. of Mass., Inc.*, 334 NLRB 1190, 1193 (2001). The D.C. Circuit did not address that issue in its decision in *Unbelievable, Inc.* because it was not before the court in that case. 118 F.3d at 800 fn.*. Thus, the Board's inherent authority to award costs to a union and the General Counsel remains a viable basis for appeal from a Board ruling awarding costs and expenses.

B. ALJ's Findings Do Not Justify the Award of Extraordinary Remedies

Even if the Board has the authority to order a respondent to pay litigation and bargaining costs, the Board's test for such extraordinary remedies has not been satisfied in this case. The Complaints allege, and the ALJ finds, that Respondents violated Sections 8(a)(1) and (5) of the Act by their bad faith bargaining and other conduct during contract negotiations with the Union. As a partial remedy for this conduct, CGC demands that Respondents be ordered to reimburse the Board and the Union for all costs and expenses incurred in the investigation, preparation, and conduct of Cases 33-CA-15780 and 33-CA-15781

before the Board and the courts. Additionally, CGC argues that Respondents should reimburse the Union for its bargaining expenses to date to restore the status quo ante. (D. at 101). Respondents contend that CGC failed to establish that these extraordinary remedies were justified under the Act and that. therefore, the ALJ's award of costs and expenses should be overruled.

1. The Record in this Case Does Not Satisfy the Heightened Test for the Award of Litigation Costs

The ALJ recommended that Respondents be ordered to reimburse the Board and the Union for the expenses incurred in the investigation, preparation, presentation, and conduct of the instant case (D. at 101). Under Board precedent, however, such an exceptionable remedy is warranted only in cases involving frivolous defenses and cases involving unfair labor practices that are flagrant, aggravated, persistent, and pervasive. *See Frontier Hotel & Casino*, 318 NLRB 857, 860-862 (1995), *enf. denied in relevant part sub nom., Unbelievable, Inc.*, 118 F.3d 795 (D.C. Cir. 1997). In those cases where the Board found the respondent's conduct sufficiently flagrant and pervasive to justify an award of attorneys' fees and costs, the unfair labor practices were much more aggravated than the violations in this case.

For example, in *Lake Holiday Manor*, 325 NLRB 469 (1998), a case cited by the ALJ, the judge found respondent's conduct both egregious and pervasive. The judge noted that respondent evinced bad faith in the litigation of the proceeding – on one occasion trying to postpone the hearing for 60 days despite

the judge's earlier warning that the hearing would not be delayed. The judge also relied on evidence that the respondent's repeated delays during bargaining prevented the parties from reaching a first contract despite the passage of seven years from the date the union was certified. *Id.* at 469. *See also 675 West End Owners Corp.*, 345 NLRB 324 (2005) (Board ordered hearing to determine litigation costs owed to union and General Counsel for respondent's "bad faith in the conduct of the litigation" by disobeying the judge's specific instructions and abuse of Board processes).

The award of litigation expenses also may be warranted in cases where the defenses raised by the respondent are "frivolous" rather than "debatable." However, if the respondent's defenses are rejected on the basis of credibility resolutions, the defenses should be considered debatable, not frivolous, and an award of litigation costs would not be justified. *See Heck's Inc.*, 215 NLRB 765, 766, 768 (1974); *Frontier Hotel*, 318 NLRB at 861 (award of litigation expenses not appropriate under "frivolous" prong if respondent's defenses are deemed debatable in that they turn on credibility resolutions). *See also Adam Wholesalers*, 322 NLRB 313 (1996) (union's request for costs and attorneys' fees denied because employer's defenses, although meritless, were not frivolous—defenses considered debatable, rather than frivolous, if they turn on issues of credibility).

In finding that Respondents committed extensive violations of the Act, the ALJ rejected the Respondents' defenses largely on the basis of credibility

resolutions. In fact, the ALJ repeatedly noted in his opinion that he found the General Counsel's witnesses more credible (D. at 74-76). In sum, an award of litigation expenses, including attorneys' fees, is not warranted under the facts of this case.[3]

2. The Record in this Case Does Not Satisfy the Heightened Test for the Award of Bargaining Costs to the Union

The ALJ also recommended that Respondents be ordered to reimburse the Union for all costs and expenses incurred in collective bargaining negotiations from January 2008 to the last bargaining session in connection with these cases (D. at 104). In *Frontier Hotel & Casino*, 318 NLRB at 859, the Board set out the standard it would apply in determining whether negotiating expenses should be awarded to a union. The Board stated:

> in cases of *unusually aggravated misconduct* . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their "effects cannot be eliminated by the application of traditional remedies," an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table. . . . This approach reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses.

Id. at 859 (citations omitted) (emphasis added).

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[3] Respondents' decision not to file exceptions to the ALJ's substantive findings in this case does not constitute an admission that Respondents' defenses to the unfair labor practice allegations lack merit.

In *August A. Busch & Co.*, *supra*, the Board concluded that this standard was met where the evidence showed "the respondent's very objective in bargaining was to create such losses to weaken Busch financially and to force it to sell to another employer." 334 NLRB at 1195. Other cases in which the Board enforced an order awarding negotiation expenses have involved similar forms of egregious conduct not found in this case. *See, e.g., Alwin Manuf. Co.*, 326 NLRB 646, 648 (1998) (respondent refused to comply with traditional remedial obligations imposed by Board, and affirmed by Seventh Circuit, in prior case, and which judge found was responsible for current breakdown in negotiations).

As these cases illustrate, the level of respondent's bad faith during negotiations must establish "beyond doubt" that its unfair labor practices cannot be eliminated by the application of traditional remedies. *August A. Busch & Co.*, 334 NLRB at 1194-95. That is not the case here. Indeed, the parties reached a tentative agreement during negotiations for a contract at Galesburg (D. at 72; Respondents' Exhibit 12). Although union members failed to ratify the tentative agreement, the fact that the parties were able to reach an agreement precludes a finding of egregious or frivolous conduct sufficient to justify the award of negotiating costs to the Union. Moreover, it demonstrates that Respondents' bad faith bargaining can be eliminated by the application of traditional remedies.

IV. CONCLUSION

For all the foregoing reasons, Respondents respectfully submit that the provisions in the recommended Order that require Respondents to reimburse the

Board and the Union for costs and expenses should be removed from the Board's final Order and that the Notice to Employees be modified accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George W. Loveland, II, do hereby certify that on this 10th day of March, 2010, true and correct copies of the foregoing Brief in Support of Respondents' Exceptions to the Administrative Law Judge's Decision were served via FedEx, prepaid, upon:

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and	)	
SERVICE EMPLOYEES INTERNATIONAL UNION, HEALTHCARE ILLINOIS INDIANA	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they a registered user or, if they are not by serving a true and correct copy at the address listed below:

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Dated at Washington, DC
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